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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1502

ECEE, INC., ET AL.,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX A

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., William L. Springer, and Don S. Smith.

	Docket Nos.
Ecee, Inc.	CI73-456, CI75-351
Pinto, Inc.	CI73-455, CI75-349
Texas Production Company	CI73-454, CI75-350

ORDER DENYING MOTIONS FOR WITHDRAWAL OF CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY AND DISMISSING APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY

(Issued January 31, 1975)

On December 26, 1972, Ecee, Inc., Pinto, Inc., and Texas Production Company filed applications for certificates of public convenience and necessity pursuant to Section 7(c) of the Natural Gas Act and Section 2.75 of the Commission's General Policy And Interpretations.[1]

After a hearing in these consolidated proceedings, the Presiding Administrative Law Judge, Martin E. Rendel-

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[1] *Optional Procedure For Certificating New Producer Sales Of Natural Gas,* 48 FPC 218, *amended* and *rehearing denied,* 48 FPC 477, *rehearing denied,* 48 FPC 1002 (1972), *affirmed* in part *John E. Moss, et al.* v. *F.P.C.,* Nos. 72-1837, *et al.,* D.C. Cir., August 15, 1974 (Reversed as to pregranted abandonment, Section 2.75(e)).

man on August 10, 1973, in Docket Nos. CI73-456, CI73-455, and CI73-454 issued an initial decision authorizing the issuance of a certificate of public

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convenience and necessity to each applicant to sell natural gas in interstate commerce to Sea Robin Pipeline Company (Sea Robin) at an initial rate of 35.0 cents per Mcf at 15.025 psia, subject to Btu adjustment, together with the construction and operation of any facilities subject to the jurisdiction of this Commission necessary therefor, and authorizing fixed escalations, as applied for, in the amount of 2.5 cents per Mcf every 36 months for twenty years. On September 14, 1973, the Commission issued an order which affirmed and adopted the findings and orders of the Administrative Law Judge issuing said certificates.

The American Public Gas Association (APGA) on October 15, 1973, filed an application for rehearing of the Commission's order of September 14, 1973. On November 8, 1973, the Commission issued an order denying APGA's application for rehearing.

On November 27, 1974, the applicants in Docket Nos. CI73-456, CI73-455 and CI73-454, respectively, filed motions for withdrawal of their certificates of public convenience and necessity pursuant to Section 2.75 contending that they have not been issued certificates of public convenience and necessity in the above dockets by a final order of the Commission. Each applicant in its motion cites a provision of the 1972 contract with Sea Robin as authority for cancellation of that contract prior to issuance of a final order by the Commission. Concurrently therewith, each

applicant asserted that its subject sale qualified for the new national rate pursuant to Opinion No. 699 and filed applications in Docket Nos. CI75-351, CI75-349 and CI75-350, respectively, for certificates of public convenience and necessity under Section 2.56(h) of the Commission's General Policy and Interpretations.

Applicants' assertion that the Commission has not issued a final order granting certificates of public convenience and necessity is unfounded and erroneous. Each applicant commenced deliveries of gas to Sea Robin under the 1972 contract on February 21, 1973, and they have now continued without interruption at the contract price for almost two years. The Administrative Law Judge's initial decision of August 10, 1973, granted each

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applicant a certificate of public convenience and necessity as applied for, and the Commission's order of September 14, 1973, adopting and affirming his findings and orders made them effective and final. By this order we determined that the rate was just and reasonable and no further action on these applications remained to be taken by the Commission.

Order No. 455 provides for termination of deliveries if commenced only "(1)if such contract for any reason shall terminate or be terminated prior to the issuance by the Commission of a final order upon review of such application, or (2) upon the issuance of a certificate containing conditions unacceptable to the party adversely affected."[2] We have reviewed each application and the Presiding Administrative Law Judge's decision issuing certificates of public convenience and necessity as applied for, and our

[2] *Id.*, p. 235.

order of September 14, 1973 clearly constituted a final order for each application as contemplated by Order No. 455.

Rehearing of the Commission's order of September 14, 1973, did not lie unless that order was a final one[3] and no court review of any order of the Commission is allowed under the Natural Gas Act unless that person has made an application to the Commission for a rehearing.[4] Therefore, APGA's application for rehearing and present pending appeal[5] of the Commission's order of September 14, 1973, which issued certificates of public convenience and necessity to the applicants, do not affect its finality. A petition for court review does not operate as a stay of the Commission's order unless specifically ordered by the Court.[6]

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Furthermore, on January 7, 1975, the Commission issued Opinion No. 699-I, which clarifies the holding in Opinion No. 699-H as to the right of a producer to receive the nationwide rate after having applied for a certificate of public convenience and necessity pursuant to the optional procedure. In Opinion No. 699-I we stated:

> "Where the average price and escalations provided for in the contract filed pursuant to the optional procedure are equal to or greater than the average price determined pursuant to the national rate regulations without regard for any price increases which might result from the biennial review of the national rate

[3] 18 C.F.R. § 1.34(a).
[4] 52 Stat. 831, 15 U.S.C. § 717r(a) (1938).
[5] APGA v. F.P.C., *appeal docketed,* No. 74-1020, D.C. Cir., January 4, 1974.
[6] 52 Stat. 831, 15 U.S.C. § 717r(c) (1938).

> pursuant to Section 2.56a(n), the Commission will determine whether to allow the producer the just and reasonable rate under the national rate structure, *provided no certificate for the subject sale has been issued pursuant to Section 2.75.*" (emphasis supplied)[7]

The average price and escalations as provided in Ecee's, Pinto's and Texas Production Company's 1972 contracts with Sea Robin is clearly less than the average price determined pursuant to the national rate regulations[8] and, therefore the applicants would not be entitled to the nationwide rate even assuming the sale had not been previously certificated. However, we reiterate that Ecee, Inc., Pinto, Inc., and Texas Production Company were each issued certificates for the subject sale by our final order of September 14, 1973, and each has made continuous deliveries of gas under its certificate.

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Ecee, Inc., Pinto, Inc., and Texas Production Company have "taken and enjoyed benefits of the optional procedure and may not [now] renounce the burdens of Order No. 455."[9]

[7] ..... FPC ....., (January 7, 1975).

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	CONTRACT	OPINION NO. 699-H
Initial Rate	35¢ at 15.025 psia	50.0¢ at 14.73 psia
Average Escalation	7.125¢	9.5¢
Average Rate	42.125¢ at 15.025 psia	59.5¢ at 14.73 psia 60.69¢ at 15.025 psia

[9] Texas Gas Exploration Corporation, ... FPC ..... at ....., Opinion No. 706 at 6.

The Commission finds:

(1) The motions filed in the above dockets present no facts or legal principles which would permit withdrawal of applicants' certificates of public convenience and necessity issued under Section 2.75, and, therefore, Commission consideration of the applications for certificates of public convenience and necessity under Section 2.56(h) for the same subject sale is not warranted.

The Commission orders:

(1) The motions filed by Ecee, Inc., Pinto, Inc., and Texas Production Company in Docket Nos. CI73-456, CI73-455, and CI75-45 (sic), respectively, for withdrawal of their certificates issued in the above dockets pursuant to Section 2.75 of the Commission's General Policy And Interpretations are denied.

(2) The applications filed by Ecee, Inc., Pinto, Inc., and Texas Production Company in Docket Nos. CI75-351, CI75-349, and CI75-350, respectively, for certificates of public convenience and necessity pursuant to Section 2.56(h) are dismissed.

By the Commission.

(Seal)

Kenneth F. Plumb,

Secretary

APPENDIX B

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman;
William L. Springer, and
Don S. Smith.

	Docket Nos.
Ecee, Inc.	CI73-456, CI75-351
Pinto, Inc.	CI73-455, CI75-349
Texas Production Company	CI73-454, CI75-350

ORDER DENYING REHEARING

(Issued March 24, 1975)

Ecee, Inc., Pinto, Inc. and Texas Production Company on February 28, 1975, have applied for rehearing and reconsideration of the Commission's order of January 31, 1975. In this order the Commission denied motions by the three applicants for withdrawal of certificates of public convenience and necessity issued under the Optional Procedure, Section 2.75 of the Commission's Regulations. On September 14, 1973, (50 FPC 727) the Commission issued an order affirming an initial decision of an Administrative Law Judge authorizing the issuance of a certificate to each applicant to sell natural gas in interstate commerce to Sea Robin Pipeline Co. at an initial rate of 35.0 cents at 15.025 psia, subject to Btu adjustment, for sales of gas from wells commenced after April 6, 1972, with fixed escalations as applied for the amount of 2.5 cents per Mcf every 36 months for twenty years. The Commission stated that each applicant commenced deliveries to Sea Robin

under the 1972 contract on February 21, 1973, and they have now continued without interruption at the contract price for almost two years.

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The Commission quoted Opinion No. 699-I[1] as holding that, under certain conditions, it could allow the producer the just and reasonable rate under the national rate structure provided no certificate for the sale had been issued under the optional procedure. The Commission found that the average price and escalations provided in the contracts with Sea Robin were less than the average price determined under the national rate regulations so that the applicants would not be entitled to the nationwide rate even assuming the sale had not been previously certificated.

In their application for rehearing the applicants contend that their certificates are not final because of pending court review proceedings brought by the American Public Gas Association.[2] We concluded that by adopting and affirming the Administrative Law Judge's decision we made the certificates final, and that no further action remained to be taken by us. As said in *Blanco Oil Co.* v. *F.P.C.*, "the touchstone of finality is suitability of judicial review."

The applicants say that they were not given a choice between the optional procedure and the national rate which was not promulgated until the issuance of Opinion No. 699 on June 21, 1974, ... FPC ..... When the optional procedure was first established by Order No. 455, on August 3, 1972, (48 FPC 218) it was offered as an alternative to

[1] *Just and Reasonable National Rates*, ... FPC ....., Opinion No. 699-I, Docket No. R-389-B, issued January 7, 1975.

[2] *American Public Gas Association* v. *F.P.C.*, D.C. Cir. No. 74-1020.

the area rates. The optional procedure permitted consideration of an application even though the contract rate was in excess of an area ceiling price. The applicant must waive all rights to seek future rate increases, other than price escalations under its contract, and must waive rights to contingent adjustment of flowing gas rates under area-rate decisions. We do not think it inequitable

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that applicants be required to adhere to the optional procedure even though area rates are increased by the establishment of a national rate or otherwise. Therefore we said in Opinion No. 699-I:

> "In providing that producers who had filed for certificates pursuant to the optional procedure could receive the national rate, we did not intend that those producers would be permitted to receive the national rate where such rate is more beneficial to the producer than the rate which was sought under the optional procedural and where deliveries have commenced pursuant to the optional procedure. That is the holding of the *Texas Gas Exploration Corporation*[5] case and Opinion No. 699-H does not reverse that holding.

[5] Docket No. CI73-681, Opinion No. 706, ... F.P.C. ....., (September 17, 1974); Opinion No. 706A, ... F.P.C. ..... (Nov. 13, 1974).

The *Texas Gas* case is in point. There Texas Gas filed an application for a certificate under the optional procedure on April 10, 1973, and deliveries commenced on April 13, 1973. An initial decision was issued October 26, 1973, and at the time of the Commission's decision the case was before the Commission on exceptions. The Commission refused to let Texas Gas withdraw pointing out that it had received

the benefit of selling gas above the ceiling price for eleven months and may not renounce the burdens. Here the proceedings have gone as far as a final Commission decision. As in *Texas Gas*, we shall not permit the applicant to withdraw so that they can refile under the higher nationwide rates.

The Commission further finds:

The assignments of error and grounds for rehearing set forth in the application for rehearing and reconsideration filed by Ecee, Pinto and Texas Production in this proceeding present no facts or legal principles which would warrant any change in or modification of the Commission's order issued January 31, 1975, subject to the above discussion.

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The Commission orders:

The application for rehearing and reconsideration filed by Ecee, Pinto and Texas Production on February 28, 1975, is denied.

By the Commission.

(SEAL)

Kenneth F. Plumb
Secretary

APPENDIX C

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ECEE, INC., ET AL.,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent.

No. 75-2327.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Feb. 17, 1976.

Natural gas producers filed petition seeking review of Federal Power Commission order denying their motions to withdraw their applications for certificates of public convenience and necessity previously filed under section 2.75 of the Commission's general policy and interpretations, and to substitute in lieu thereof new applications at the nationwide rate under section 2.56. The Court of Appeals, Coleman, Circuit Judge, held that (1) the FPC order issuing certificates under section 2.75, the rule provision relating to an optional procedure for certifying new producer sales of natural gas, was final, and (2) the FPC opinion precluding employment by petitioner of the national rate structure was neither arbitrary nor unjust nor an abuse of discretion; having previously chosen the higher optional rate in preference to the then existing area rate, petitioners were bound by their choice.

Affirmed.

1. Administrative Law and Procedure — 704

Final orders are not limited to the last order in a proceeding, but to be final an order must impose an obligation,

deny a right, or fix some legal relationship as a consummation of the administrative process.

2. Gas — 6

Federal Power Commission order issuing certificates of public convenience and necessity to gas producers under section 2.75 of the Commission's general policy and interpretations, pertaining to an optional procedure for certificating new producer sales of natural gas, was final despite third party's petition for review, as the order, which adopted the administrative law judge's findings and issued the certificates, finally sanctioned and established a legal relationship among the producers, buyer, and the FPC, and as the administrative petition was ripe for judicial review.

3. Administrative Law and Procedure — 704
Courts — 405(12)

A complete resolution of matters before an administrative or judicial tribunal does not wait for finality until an appeal is decided; it is final unless and until it is stayed, modified, or reversed.

4. Gas — 14.5(5)

Absent a stay, orders of the Federal Power Commission are entitled to have administrative operation and effect during the disposition of review proceedings. Natural Gas Act, § 19(c), 15 U.S.C.A. § 717r(c).

5. Gas — 6

Certificates of public convenience and necessity issued to natural gas producers by the Federal Power Commission

under section 2.75 of its general policy and interpretations, pertaining to an optional procedure for certificating new producer sales of natural gas, were "accepted" when they were issued, without condition or modification, exactly as the parties requested.

6. Gas — 14.1(3)

Since the issuance of certificates of public convenience and necessity by the

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Federal Power Commission to natural gas producers, in accordance with their applications filed under section 2.75 of the Commission's general policy and interpretations, was final in September of 1973, the contractual provision permitting termination prior to that event was inoperative when termination was attempted in November of 1974, and the national rate was unavailable to the producers.

7. Gas — 14.1(1)

A producer of natural gas may benefit by the area rate structure or the national structure, but not both.

8. Gas — 6

In determining whether to grant a certificate of public convenience and necessity permitting a producer to sell natural gas in interstate commerce, benefit to the producer is certainly not the Federal Power Commission's only consideration; public interest is always involved and the FPC, as its guardian, must determine in every proceeding whether the certificate applied for is in the public interest or whether that interest calls for some other disposition.

9. Gas — 14.3(4)

As petitioner gas producers, who in December of 1972 filed applications for certificates of public convenience and necessity permitting them to sell natural gas in interstate commerce, set a 35¢ per MCF figure themselves, as they sought approval thereof from the Federal Power Commission, as they obtained approval, in final form, and as they operated under it for two years, the fact that a higher price, to wit, an increase in the national rate, subsequently became available did not entitle petitioners to erase all that had gone on before, and the FPC thus acted within its authority in denying petitioners' applications to substitute new applications at the nationwide rate under section 2.56 of the Commission's general policy and interpretations.

Petition for Review of an Order of the Federal Power Commission.

Before THORNBERRY, COLEMAN and MORGAN, Circuit Judges.

COLEMAN, Circuit Judge.

The petitioning natural gas producers seek review of Federal Power Commission denial of their motions to withdraw their applications for certificates of public convenience and necessity previously filed under § 2.75 of the Commission's General Policy and Interpretations,[1] and to

[1] 18 C.F.R. § 2.75. Optional Procedure for Certificating New Producer Sales of Natural Gas. FPC Order No. 455, issued August 3, 1972, established § 2.75 to permit sales of natural gas from wells commenced on or after April 6, 1972, at a "just and reasonable" rate which "may be in excess of an area ceiling rate established in a prior opinion or order. . . ." The procedure, save one portion which is inapposite here, was sustained in *Moss* v. *FPC*, 1974, 164 U.S.App.D.C. 1, 502 F.2d 461. Certiorari was granted as to the issue with which we are not now concerned.

substitute in lieu thereof new applications at the nationwide rate under § 2.56.[2]

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The Commission order issuing the certificates under § 2.75 was, we find, final. The opinion precluding employment of the national rate structure was neither arbitrary nor unjust, nor an abuse of discretion. Having chosen the higher optional rate in preference to the then existing area rate, Petitioners are bound by their choice.

The orders of the Commission are affirmed.

Facts of the Case

The events leading to the petition for review were as follows:

(1) December 26, 1972. Petitioners filed applications for certificates of public convenience and necessity permitting them to sell natural gas in interstate commerce. Section 2.75 was invoked to permit sales to Sea Robin Pipeline Company from offshore Louisiana at 35.0 cents per Mcf for a period of 20 years with price escalations of 2.5

[2] 18 C.F.R. § 2.56. FPC Opinion No. 699, issued June 21, 1974, amended § 2.56 to make the initial uniform national rate of 42 cents per Mcf applicable to interstate sales from wells commenced on or after January 1, 1973, and sales made pursuant to contracts executed on or after January 1, 1973, for gas not previously sold in interstate commerce. The new national rate structure which replaced area rates was affirmed in National Rate Cases for New Gas (*Shell Oil Co.* v. *FPC*), 5 Cir. 1975, 520 F.2d 1061.

cents per Mcf every 36 months after the date of initial delivery.

Once an application under the optional procedure was made, deliveries could commence prior to a Commission decision on the application, but for the first six months the rate could be no higher than the prevailing area rate. If the Commission had not made a decision within that time, the rate could be raised to the contract price until the Commission entered a final order, without being subject to refund. Section 2.75(n) permitted termination of deliveries so commenced.

> (1) if such contract for any reason shall terminate or be terminated prior to the issuance by the Commission of a final order upon review of such application, or (2) upon the issuance of a certificate containing conditions unacceptable to the party adversely affected.

(2) February 21, 1973. Pursuant to these procedures deliveries commenced at the area rate of 26 cents per Mcf.

(3) August 10, 1973. Following a hearing on the applications, the Administrative Law Judge entered an initial decision authorizing the issuance of the certificates in the form sought. In evaluating the costs and rate of return, the ALJ relied upon the Commission's preference for employment of the concept of national industry costs, rather than those of the individual company, as established in FPC Opinion 659, Belco Petroleum Corp., issued May 30, 1973. Based upon estimated 1971 costs for finding and producing gas and applying what it believed to be a reasonable 15 percent return, *Belco* found 45 cents per Mcf to be a just and reasonable rate for offshore Louisiana gas. Noting that the 35 cent figure in the instant contracts was the low-

est cost supply source available to Sea Robin and was more than 25 percent below what the FPC considered reasonable for the same area, the ALJ saw no reason for objecting to the requested rate.

(4) August 21, 1973. Six months after the deliveries had commenced and no final order having been issued by the Commission, Petitioners began collecting the contract rate of 35 cents per Mcf.

(5) September 14, 1973. The FPC entered an order affirming and adopting the decision of the ALJ and issued the certificates.

(6) November 8, 1973. The Commission denied rehearing applied for by the American Public Gas Association (APGA).

(7) January 4, 1974. APGA filed a petition for review in the Court of Appeals.

(8) June 21, 1974. The Commission adopted a national rate structure aimed

at replacing area proceedings. The national rate was set at 42.0 cents per Mcf. Opinion No. 699.[3]

(9) November 12, 1974. The producers, relying on a contractual provision authorizing cancellation of the contract prior to issuance of a final order by the Commission, terminated the 1972 agreement with Sea Robin and entered a new contract at the national rate level. The termination was not to be effective and deliveries were to continue under

[3] The national rate was increased to 50.0 cents per Mcf on December 4, 1974, by FPC Opinion No. 699-H.

the 1972 contract until the FPC issued a certificate covering the 1974 agreement. Petitioners maintained that this was permissible since the Commission's 1973 order issuing the certificates was not "final" because APGA had a petition pending for review.

(10) November 27, 1974. Fifteen months after they had been collecting the higher contract rate and fourteen months after certification, Petitioners filed motions to withdraw from their certificates and submitted new applications for sales at the national rate level. The producers requested, however, that the withdrawal be contingent upon the issuance of certificates at the higher level.

(11) January 31, 1975. The Commission denied the motions to withdraw and dismissed the applications for certificates at the national rate. The FPC, noting the Natural Gas Act provision that a petition for review does not stay the effect of an order unless "specifically ordered by the court", 15 U.S.C. § 717r(c), determined that the petition for review did not affect the finality of its order. It also observed that the sought after judicial review had not affected the deliveries or collection of the contract rate.

Further, Opinion No. 699-I, adopted January 7, 1975, was held to be dispositive in denying the national rate to Petitioners. The decision, in setting eligibility standards, provides:

> Where the average price and escalations provided for in the contract filed pursuant to the optional procedure are equal to or greater than the average price determined pursuant to the national rate regulations without regard for any price increases which might result from the biennial review of the national rate pursuant to Section 2.56(n), the Commission will determine whether to allow the just and reasonable rate under the national rate structure, *provided no certificate for the subject sale has been issued pursuant to Section 2.75.* (Emphasis added.)

Thus, issuance of the certificates made the producers ineligible for the rate. Moreover, even if the certificates had not been issued, the fact that the average contract price and escalations were lower than the average national price disqualified Petitioners.[4]

(12) February 28, 1975. A rehearing was sought, raising the additional claim that denial of the opportunity to collect the nationwide rate was unfair and inequitable.

Petitioners maintained that they chose the optional procedure in preference to area rates prior to adoption of national rate procedure, and should be allowed to choose the latter. In denying the rehearing, the Commission responded that for two years Petitioners had had the advantage of selling gas at a price

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some 35 percent above the area ceiling. The FPC saw nothing inequitable in not permitting a switch just because the area ceiling had been effectively increased by the national rate; although Petitioners might find the higher figure attractive, there would be no corresponding benefit to the public to offset the increased prices.

(13) July 27, 1975. APGA voluntarily dismissed its petition for review.

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[4] Contract average of 42.125 cents at 15.025 psia as opposed to the national average of 60.69 cents at 15.025 psia.

(14) May 22, 1975. The producers filed this petition for review.

Finality of the Order

[1] Final orders are not limited to the last order in a proceeding, but *to be final* an order must "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process". *Chicago & Southern Airlines* v. *Waterman Steamship Corp.,* 333 U.S. 103, 113, 68 S.Ct. 431, 437, 92 L.Ed. 568 (1948). *See also Columbia Broadcasting System* v. *United States,* 316 U.S. 407, 62 S.Ct. 1194, 86 L.Ed. 1563 (1942); *Bethesda-Chevy Chase Broadcasters Inc.* v. *FCC,* 1967, 128 U.S.App.D.C. 185, 385 F.2d 967, 968.

[2] The order of the Commission adopting the findings of the Administrative Law Judge and issuing the certificates finally sanctioned and established the legal relationships among the Petitioners, Sea Robin, and the FPC. The order would not have been reviewable by the Court of Appeals under the terms of the Natural Gas Act had it not done so. 15 U.S.C § 717r(b). The fact that the decision was ripe for judicial review was the "touchstone of finality". *Blanco Oil Co.* v. *FPC,* 1973, 158 U.S.App.D.C. 257, 485 F.2d 1036, 1038.

[3, 4] A *complete* resolution of matters before an administrative or judicial tribunal does not wait for finality until an appeal is decided; it is final *unless and until* it is stayed, modified, or reversed. This basic concept is further bolstered by the unequivocal language of § 717r(c) of the Natural Gas Act that "the commencement of proceedings [for review] . . . shall not, unless specifically ordered by the court, operate as a stay of the Commission's order". In the absence of a stay, the FPC's orders are entitled to have

administrative operation and effect during the disposition of the proceedings. *Jupiter Corp.* v. *FPC,* 1969, 137 U.S. App.D.C. 295, 424 F.2d 783, 791.

We must interpret the word "final" as the parties must have understood it at the time they entered into the agreement *within the framework of the Natural Gas Act. Mitchell Energy Corp.* v. *FPC,* 5 Cir. 1975, 519 F.2d 36, 41; *Texas Eastern Transmission Corp.* v. *FPC,* 5 Cir. 1962, 306 F.2d 345, 347. The previously noted provisions of the Act all lead to the inescapable conclusion that Congress intended and the parties must have understood the Commission's action to be its final disposition of the matter.

If there was ever any doubt, the FPC's interpretation and policies, to which we may resort,[5] are even clearer. For example, § 2.75 itself provides in part:

> 1. A final order of this Commission issuing a certificate as applied for, or issuing a conditioned certificate acceptable to the applicants, shall consti-

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> tute a final determination that the rates, charges and services are just, reasonable and required by the present and future public convenience and necessity.
>
> n. . . . . If the Commission by final order shall deny such application, or if the party or parties to the contract adversely affected shall not accept the terms and conditions prescribed . . ., deliveries thereunder shall be terminated . . .

[5] *Hodgson* v. *Mauldin,* N.D.Ala.1972, 344 F.Supp. 302, 307, *aff'd,* 5 Cir. 1973, 478 F.2d 702.

> o. . . . [D]eliveries will be made at rates no higher than the prevailing area ceiling rate and shall so continue for six months unless the Commission has made its final orders . . .; at the end of such six-month period (if the Commission has not made its final order), the seller . . . shall be entitled to receive . . . the rates specified in the contract, and such contract rates shall continue . . . until the Commission enters its final order on the certificate application.

Petitioners further claim that they had not yet accepted the certificates because the Court, upon hearing APGA's allegations, might have ordered the Commission to refuse certification of the sales or to attach conditions unacceptable to the contracting parties. Had this occurred the sales would have terminated. *See Public Serv. Comm'n of State of N.Y.* v. *FPC*, 1972, 149 U.S.App.D.C. 421, 463 F.2d 824, 829-30; 18 C.F.R. § 2.75(n). Therein lay Petitioners' remedy if the appellate disposition of the case was contrary to the Commission's final order.

[5] It is obvious to us that the certificates were "accepted" when they were issued, without condition or modification, *exactly as the parties requested.* The producers sought no rehearing or alteration; rather, they proceeded for the next fourteen months to sell gas above the area rate *under the authority* of the certificates which they now seek to attack.

Effect of Finality

[6] Since the issuance of certificates was final in September, 1973, the contractual provision permitting termination prior to that event was inoperative when termination was attempted in November, 1974. The original contract

as entered into in 1972 stands. Thus, Petitioners were not entitled to the national rate as originally promulgated, and certainly not as it was construed by later opinions. The FPC's original Opinion 699, June 21, 1974, made the nationwide rate applicable to interstate sales from wells commenced on or after January 1, 1973, and to sales made pursuant to contracts executed on or after January 1, 1973, for gas not previously sold in interstate commerce. Petitioners' contract was entered into in 1972.

Subsequent Opinion 699-I, January 7, 1975, (quoted in the factual recitation) is even more direct. When a certificate has been issued pursuant to § 2.75, the national rate is not available.

Equity of the Restriction

Petitioners claim that binding them to the certificates as issued is unfair because they never had the opportunity to choose the national rate structure. This argument begs the question. The producers sought and received a price for their gas under the optional procedure some 35 percent above the area rate they would otherwise have been required to accept. They collected the higher rate for almost a year before the nationwide schedule was promulgated.

Obviously there are differences between the national structure and the

area procedure other than a quantum increase in price, but price is the real issue in this case. In that regard, the nationwide structure amounts really to abandoning area boundaries and increasing the rates. We must recognize our statement in *Mitchell Energy Corp.* v. *FPC*, 5 Cir. 1975, 519 F.2d 36, 43, that

> [t]he above-ceiling settlement rate was a waiver of the limits of the area rate structure. The relief accorded Mitchell was thus inextricably related to that structure, because Mitchell was thereby insulated from the strictures of the moratorium within that rate structure. As a logical consequence, Mitchell was not affected by subsequent modification of the area rate structure. Mitchell, therefore, remained bound by the terms of its own agreement . . ..

[7] A producer may benefit by one procedure, or the other, *but not both. Cf. Moss v. FPC,* 1974, 164 U.S.App. D.C. 1, 502 F.2d 461, 470.

[8] In determining whether or not to grant a certificate, benefit to the producer is certainly not the FPC's only consideration. Public interest is always involved and "the Commission, as its guardian, must determine in every proceeding whether the certificate applied for is in the public interest or whether that interest calls for some other disposition". *Panhandle Eastern Pipe Line Co.* v. *FPC,* 3 Cir. 1967, 386 F.2d 607, 610. What public interest will be satisfied by permitting Petitioners to raise the price of flowing gas?

The stated purpose of the higher national rates for new gas was to encourage larger interstate sales and promote further exploration. Petitioners did not appear before the Commission when it held hearings to set the cutoff date; nor have they advanced any cogent arguments as to how ultimate consumers will be benefited in paying higher prices for developed gas supplies already committed to interstate commerce.

[9] Petitioners set the 35 cent rate themselves. They sought its approval from the Commission. They obtained

that approval, in final form. They operated under it for two years. A higher price becoming available, the Petitioners wish to erase all that had gone on before. For all the reasons hereinabove set forth, the Commission was within its authority, properly exercised, when it denied the erasure.

Affirmed.

APPENDIX D

D-1

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1975

No. 75-2327

YOUR NOS. FPC CI73-545, ET AL
ECEE, INC., ET AL.,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION (TEXAS CASE)

Before THORNBERRY, COLEMAN and MORGAN,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of Ecee, Inc., et al. for review of an order of the Federal Power Commission of the United States, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the petition for review of an order of the Federal Power Commission in this Cause be, and the same is hereby affirmed;

It is further ordered that petitioners pay to respondent, the costs on appeal to be taxed by the Clerk of this Court.

February 17, 1976

APPENDIX E

OPINION NO. 699

(A) *The Commission,* acting pursuant to the provisions of the Natural Gas Act, as amended, particularly Sections 4, 5, 7, 8, 14, 15, and 16 thereof (52 Stat. 822, 823, 824, 825, 828, 829, 830 (1938); 56 Stat. 83, 84 (1942); 61 Stat. 459 (1947); 76 Stat. 72 (1962); 15 U.S.C. 717c, 717d, 717f, 717g, 717m, 717n, 717o) hereby *orders* that its General Rules Part 2, Subchapter A of Chapter 1, Title 18 of the Code of Federal Regulations, be amended by adding new Section 2.56(h), as follows:

2.56(h) National Rate For Sales Of Natural Gas From Wells Commenced On Or After January 1, 1973, And New Dedications Of Natural Gas To Interstate Commerce On Or After January 1, 1973

(1) Notwithstanding any other provisions in the General Rules of Practice and Procedure of the Federal Power Commission, or the Regulations Under the Natural Gas Act of the Federal Power Commission, sales of natural gas in interstate commerce made from wells commenced on or after January 1, 1973; or pursuant to contracts executed on or after January 1, 1973, for the sale of natural gas in interstate commerce for gas not previously sold in interstate commerce except pursuant to the provisions of 18 C.F.R. §§ 2.68, 2.70, 157.22, or 157.29 (including sales made pursuant to those sections as modified by Order No. 491); or pursuant to contracts executed on or after January 1, 1973, where the sales were formerly made pursuant to permanent certificates of unlimited duration under contracts which expired by their own terms on or after January 1, 1973, within the United States may be made at a price not to exceed 42.0 cents per Mcf (at 14.73 psia), exclusive of state production taxes and subject to the adjustments herein provided.

APPENDIX F

OPINION NO. 699-H

The Commission, acting pursuant to the provisions of the Natural Gas Act, as amended, particularly Sections 4, 5, 7, 8, 14, 15, and 16 thereof (52 Stat. 822, 823, 824, 825, 828, 829, 830 (1938); 56 Stat. 83, 84 (1942); 61 Stat. 459 (1947); 76 Stat. 72 (1962); 15 U.S.C. §§ 717c, 717d, 717f, 717g, 717m, 717n, 717o (1970)0, *orders*:

(A) The Statements of General Policy and Interpretations of The Commission, Part 2 of Subchapter A of Chapter I of Title 18 of the Code of Federal Regulations, are hereby amended by deleting Section 2.56(h) adding a new Section 2.56a as follows:

2.56a National Rate For Sales Of Natural Gas From Wells Commenced On Or After January 1, 1973, And New Dedications Of Natural Gas To Interstate Commerce On Or After January 1, 1973

(a) *Base National Rate*

(1) Notwithstanding any other provision of the General Rules of the Federal Power Commission, or the Regulations Under the Natural Gas Act, sales of natural gas which qualify under the provisions of one or more of the classifications set forth in paragraph (2) may be made in interstate commerce at a rate not to exceed 50.0 cents per Mcf (at 14.73 psia), exclusive of all State or Federal production, severance or similar taxes, and subject to the adjustments provided in this Section 2.56a.

(2) Sales of natural gas in interstate commerce for resale may be made at the rate prescribed in paragraph (1) of this subsection provided the provisions of one or more of the following classifications apply to such sales:

(i) The sale is made from a well or wells commenced on or after January 1, 1973;

(ii) Sales made pursuant to contracts for the the sale of natural gas in interstate commerce for gas not previously sold in interstate commerce prior to January 1, 1973, except pursuant to the provisions of 18 C.F.R. §§ 2.68, 2.70, 157.22, or 157.29 (including sales made pursuant to those sections as modified by Federal Power Commission Order No. 491, *et al.*), or 18 C.F.R. § 2.75(n), where such sales are initiated on or after January 1, 1973, provided that no certificate for the subject sale has been issued under the optional procedure (18 C.F.R. § 2.75).

APPENDIX G

OPINION NO. 699-I

The Commission, acting pursuant to the provisions of the Natural Gas Act, as amended, particularly Sections 4, 5, 7, 8, 14, 15, and 16 thereof (52 Stat. 822, 823, 824, 825, 828, 829, 830 (1938); 56 Stat. 83, 84, (1942); 61 Stat. 459 (1947); 76 Stat. 72 (1962); 15 U.S.C. §§ 717c, 717d, 717f, 717g, 717m, 717n, 717o, (1970)), *orders:*

(A) Section 2.56a(a) (2) (ii) [18 C.F.R. § 2.56a(a) (2) (ii) is amended to read as follows:

(ii) Sales made pursuant to (A) contracts for the sale of natural gas in interstate commerce for gas not previously sold in interstate commerce prior to January 1, 1973, except pursuant to the provisions of 18 C.F.R. §§ 2.68, 2.70, 157.22, or 157.29 (including sales made pursuant to those sections as modified by Federal Power Commission Order No. 491, *et al.*); or (B) 18 C.F.R. § 2.75(n), where such sales are initiated on or after January 1, 1973, if the average of the sum of the proposed contract price, periodic escalations, and Btu and tax adjustments is greater than the average of the sum of the base national rate prescribed in section 2.56a(a) (1), the annual escalation prescribed in section 2.56a(a) (3), and the Btu and tax adjustments prescribed in sections 2.56a(c) and 2.56a(b) (1), over the term of the contract submitted for certification pursuant to the optional procedure, provided that no certificate for the subject sale has been issued pursuant to the optional procedure (18 C.F.R. § 2.75).

APPENDIX H

Sec. 2.75 Optional Procedure for Certificating New Producer Sales of Natural Gas.

. . . .

n. Upon the filing of an application under this Section, deliveries pursuant to the provisions of the tendered contract may be commenced, pending review of such application by the Commission. Notice of commencement of deliveries shall be given to the Commission within ten days after deliveries first commence, and shall include all pertinent information concerning the deliveries. Any such deliveries so commenced may be terminated (1) if such contract for any reason shall terminate or be terminated prior to the issuance by the Commission of a final order upon review of such application, or (2) upon the issuance of a certificate containing conditions unacceptable to the party adversely affected. If the Commission by final order shall deny such application, or if the party or parties to the contract adversely affected shall not accept the terms and conditions prescribed by the Commission, deliveries thereunder shall be terminated. Within thirty days after termination of deliveries, the seller shall notify the Commission of such termination, and shall report the date of termination, volumes delivered, and revenues received.